Supreme Court, U.S.
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No. 08-1131

Supreme Court of the United States

SOPHAL PHON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

When a juvenile receives a sentence less than death, does that sentence run afoul of this Court's holding in *Roper v. Simmons?*

II.

When a juvenile has committed capital crimes and is tried as an adult, is a sentence of Life Without Parole (LWOP) cruel and unusal punishment under the Eighth Amendment of the United States Constitution?

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STATEMENT OF THE CASE

The facts and procedural history of this case were summarized by the Kentucky Court of Appeals in *Phon v. Commonwealth*, 51 S.W.3d 456 (Ky.App. 2001) as follows:

> On October 31, 1996, Phon, then sixteen years old[1], was transferred to Warren Circuit Court as a youthful offender. On November 13, 1996, he was indicted on several charges: two counts of murder, first-degree assault, and first-degree robbery and burglary. These charges arose from Phon's execution-style shooting of a Warren County couple and their 12-year-old daughter in their home on August 17, 1996; only the child survived. The Commonwealth sought the death penalty for the two murders charged in the indictment.
>
> Phon was represented by Vincent P. Yustas, an employee of the Department of Public Advocacy (DPA) and a member of its Capital Trial Unit. Phon's mitigation defense was that he was acting under duress or under the domination of twenty-six-year-old Outh Sananikone, one of his four co-defendants and the leader of a gang to which Phon belonged. Phon claimed that he believed that if he did not shoot the victims as ordered by Sananikone, he and his family would be killed in retaliation. Yustas attempted to obtain a severance of Phon's trial from that of his co-defendants but was only partially successful; the trial court denied the request to be severed from Sananikone.
>
> After the crimes had been committed but

prior to Phon's trial which was scheduled to commence on July 6, 1998, the Legislature amended the penalties in KRS 532.030(1)(effective July 15, 1998) to permit the imposition of life without the possibility of parole. The Commonwealth moved the trial court for a ruling preventing application of this new penalty - presumably making the imposition of the death penalty more likely. The trial court denied the motion on July 2, 1998.[1] On July 5, 1998, Phon entered an open-ended guilty plea with no recommendation as to sentencing on any of the charges by the Commonwealth. He also executed a document consenting to the jury's consideration of the penalties in the newly amended KRS 532.030(1). After a two-week sentencing trial, the jury recommended that Phon be sentenced to life without parole for each of the murders and to twenty years for each of the other crimes.

Phon's case has resulted in two published decisions: *Commonwealth v. Phon,* 17 S.W.3d 106 (Ky. 2000)(certification of law as to whether life without parole [LWOP] applied to Phon) and *Phon v. Commonwealth,* 51 S.W.3d 456 (Ky.App. 2001)(affirming the denial of Phon's RCr 11.42 motion). On February 20, 2006, Phon filed a successive post-

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[1]The trial court's ruling was upheld in the motion filed by the Commonwealth for a certification of law. *See Commonwealth v. Phon,* 17 S.W.3d 106 (Ky. 2000).

conviction motion (pursuant to RCr[2] 11.42 and CR[3] 60.02(e) and (f)) seeking a new sentencing hearing in light of the United States Supreme Court decision in *Roper v. Simmons,* 543 U.S. 551 (2005)(finding it unconstitutional to impose a sentence of death for individuals who commit capital crimes while under the age of eighteen). After the Commonwealth responded (and Phon replied), a hearing was held on June 26, 2006 in Warren Circuit Court. In a very well-reasoned Order, the circuit court denied Phon's CR 60.02 motion and

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[2]"RCr" refers to the Kentucky Rules of Criminal Procedure. For reference, the proper post-conviction procedure in Kentucky is explained in *Gross v. Commonwealth*, 648 S.W.2d 853 (1983). By comparison, a motion pursuant to RCr 11.42 to vacate, set aside, or correct sentence is a collateral attack rule similar to 28 U.S.C. § 2255.

[3]"CR" refers to the Kentucky Rules of Civil Procedure. For reference, the proper post-conviction procedure in Kentucky is explained in *Gross v. Commonwealth,* 648 S.W.2d 853 (Ky. 1983). By comparison, a motion pursuant to CR 60.02 is similar to motion under Federal Rule of Civil Procedure 60(b).

declined to extend the holding in *Roper* to Phon's case.[4]

On March 7, 2008, the Kentucky Court of Appeals issued a unanimous Opinion affirming the judgment of the circuit court. *Phon v. Commonwealth,* 2006-CA-002456 [2008 WL 612283] (Ky.App. 2008). In its Opinion, the Court of Appeals, found that the trial court did not abuse its discretion denying Phon's motion. *Slip Opinion*, pg. 8, *citing Sims v. Commonwealth*, 233 S.W.3d 731 (Ky.App. 2007) and *Brady v. United States,* 397 U.S. 742 (1970), the Court of Appeals reasoned that Phon's guilty plea and subsequent jury sentencing to life imprisonment without the possibility of parole did not require a new sentencing hearing for Phon. *Id.* at 4-7. From that basis, the Court of Appeals reiterated that *Roper v. Simmons*, 543 U.S. 551 (2005) only has retroactive application when a sentence of death was imposed on a defendant under the age of eighteen (18) at the time of the offense. *Id.* at 7-8. Phon moved for discretionary review and was denied by the Kentucky Supreme Court on December 10, 2008.

In Phon's petition, it was alleged that he was sixteen (16) when he committed his crimes (two counts of capital murder and first-degree assault). However, it

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[4]Phon's successive RCr 11.42 motion was not addressed by the trial court's Order - as this issue was not properly raised pursuant to that rule. That finding was not specifically appealed and the case was heard in the Kentucky courts as an appeal of the denial of a CR 60.02 motion - which is reviewed for an abuse of discretion. *Gross v. Commonwealth*, 648 S.W.2d 853, (Ky. 1983).

is noteworthy that in the Judgment and Sentence on Plea of Guilty, the trial court found that Phon was seventeen (17) years of age at the time he committed the crimes on August 17, 1996 — as the date of birth in the indictment listed Phon's date of birth as February 12, 1979 (making Phon approximately seventeen and one-half [17½] years of age when he committed these crimes). During testimony, Phon's mother apparently testified that she incorrectly gave immigration officials Phon's birthday and that he was actually born on September 26, 1979. When authoring its opinion in *Phon v. Commonwealth*, 51 S.W.3d 456 (Ky.App. 2001), the Kentucky Court of Appeals apparently incorrectly adopted the later date as Phon's date of birth rather than the age found by the trial court.

REASONS FOR DENYING THE WRIT

I.

PHON'S SENTENCE OF LIFE WITHOUT PAROLE IS NOT AFFECTED BY *ROPER V. SIMMONS*.

In his Petition, Phon has alleged that he is entitled to a new sentencing hearing because his sentence of life without parole (LWOP) was only available due to the fact that he was death-eligible - a sentence that would have been invalidated by *Roper v. Simmons*[5] as cruel and unusual punishment if it had been received. Petition, pgs. 6-22. For the reasons noted herein, Phon's petition should be denied.

Phon has not cited to any authority that *Roper* applies to a case in which the death penalty was not imposed. Indeed, Phon does not point to any case in which a court has determined that this Court's decision in *Roper* should be applied to prohibit life imprisonment involving a juvenile.[6] Rather, those federal courts that have considered the applicability of *Roper* to a juvenile's term of life imprisonment have universally decided that it is inapplicable and irrelevant. *See In re Hill*, 437 F.3d 1080, 1082 at fn. 1 (11th Cir.2006); *United States v. Pete*, 277 Fed. Appx. 730, 734 (9th Cir. 2008); *United*

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[5]543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

States v. Feemster, 483 F.3d 583, 588 (8th Cir. 2007), *vacated on other grounds*, 128 S. Ct. 880 (2008); *United States v. Salahuddin,* 509 F.3d 858 (7th Cir. 2007); *Calderon v. Schribner*, 2009 WL 89279, *4-6 (E.D. Cal. Jan. 12, 2009); *Culpepper v. McDonough,* 2007 WL 2050970, *4-5 (M.D. Fla. July 13, 2007); *Douma v. Workman,* 2007 WL 2331883, *3 (N.D. Okla. 2007); *Pineda v. Leblanc,* 2008 WL 294685, *3 (E.D. La. Jan. 31, 2008); *Schane v. Cain,* 2007 WL 4967081 (W.D.La. 2007); *Sharikas v. Kelly,* 2009 WL 1382604, *2 (E.D.Va. 2009); *Byrd v. Quarterman,* Case No. 3:08cv1414b, 2008 WL 4427265, *2 (N.D. Tex. Sept. 26, 2008); *cf. Smith v. Howes,* 2007 WL 522697, *2 (E.D. Mich. Feb. 14, 2007) (finding *Roper* inapplicable to juvenile sentenced to thirty to sixty years in prison). States courts have similarly been in accord. *See, e.g., People v. Demirdjan,* 50 Cal. Rptr. 3d 184, 186-87 (Cal. App. Ct. 2006); *State v. Allen*, 958 A.2d 1214, 1233-36 (Conn. 2008); *Wallace v. State,* 956 A.2d 630, 638-41 (Del. 2008); *Commonwealth v. Wilson,* 911 A.2d 942 (Pa.Super.

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[6]Phon has relied heavily on *State v. Morgan,* 626 S.E.2d 888 (S.C. 2006). However, in that case, Morgan received the death penalty, therefore, *Roper* invalidated his earlier sentence. That is not the case here. Similarly, reliance on *Shepherd v. Commonwealth,* 251 S.W.3d 309 (Ky. 2008) is misplaced. The *Shepherd* Court concluded that juveniles tried as adults could not be sentenced to LWOP because they are sentenced under KRS 640.040(1) - Kentucky's Youthful Offender Statute. The conclusion of the *Shepherd* Court was based on a matter of state statutory law decided well after Phon's case.

2006); *Culpepper v. State,* 971 So. 2d 259, 260-61 (Fla. 2d DCA 2008); *People v. Griffin,* 857 N.E.2d 889, 899 (Ill. App. Ct. 2006); *Sims v. Commonwealth,* 233 S.W.3d 731, 732-33 (Ky.App. 2007); *State v. Warren,* 887 N.E.2d 1145, 1149 (Ohio 2008); *State v. Rideout,* 933 A.2d 706, 718-19 (Vt. 2007). *See also Cobos v. Dennison,* 825 N.Y.S.2d 332 (N.Y. Sup. Ct., App. Div. 2006); *State v. Avery,* 649 S.E.2d 102, 108 (S.C. Ct. App. 2007). Authority is not split on this issue.

This Court's reasoning in *Roper* was based "in large measure on the 'special force' with which the Eighth Amendment applies when the state imposes the ultimate punishment of death." *United States v. Mays,* 466 F.3d 335, 340 (5th Cir.2006) (*citing Roper*, 543 U.S. at 568-69, 125 S.Ct. 1183). This is so because "the death penalty is different from other punishments in kind rather than degree." *Solem v. Helm,* 463 U.S. 277, 294, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Phon's sentence of life without parole, regardless of the circumstances of its imposition, does not implicate the new constitutional rule announced in *Roper.*

On the contrary, in *Roper,* this Court noted that based on sociological and physiological evidence that persons under the age of eighteen differ from adults in terms of their culpability and moral responsibility. Id. Therefore, it was concluded that an Eighth Amendment violation occurred because "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders." *Roper v. Simmons,* 543 U.S. at 572, 125 S.Ct. 1183. However, this Court also stated that it could not "deny or overlook the brutal crimes too many juvenile offenders have committed," *Id.* Consequently, it held that "when a

juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties", Id. at 574, 125 S.Ct. 1183, and as an alternative to the death penalty gave note to the fact that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* at 572, 125 S.Ct. 1183. It is logical that this Court would not have recognized a sentence of LWOP as an acceptable alternative to death in this context if such a sentence would violate the Eighth Amendment. *See United States v. Feemster,* 483 F.3d 583, 588 (8th Cir.2007)("[a]lthough the execution of a juvenile is impermissible under the [e]ighth and [f]ourteenth [a]mendments [to the federal constitution], sentencing a juvenile to life imprisonment is not") *vacated and remanded on other grounds*, — U.S. —, 128 S.Ct. 880, 169 L.Ed.2d 718 (2008). Thus while the Eighth Amendment affords heightened significance to the "diminished culpability" of juveniles, the reasoning of *Roper* does not extend its constitutional prohibition to the imposition of a life sentence without the possibility of release when the offender is a juvenile.

Also of significance, at the time of Phon's trial, Kentucky had recently enacted legislation that created an LWOP alternative for capital sentencing.[7] Phon

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[7]It is worth noting that pursuant to Kentucky's sentencing scheme, in Phon's case, the jury could have selected lesser sentences even upon finding the aggravating circumstances, e.g., 20 years. KRS 532.025. Kentucky is somewhat unique in that

desired the legislation to have retroactive application to capital crimes committed prior to its enactment and gave his consent (which was required) to the inclusion of LWOP in his sentencing scheme. *Commonwealth v. Phon,* 17 S.W.3d 106, 107-108 (Ky. 2000). The Commonwealth argued against its inclusion and upon a certification of law as to its applicability the Kentucky Supreme Court ruled that Phon was entitled to the LWOP instruction. From that basis, it was held that in accordance with the "unqualified consent of [Phon], a sentence of life without parole may be lawfully imposed for capital crimes committed before July 15, 1998." *Phon I*, at 108. In his concurring opinion, Kentucky Supreme Court Justice William S. Cooper noted that, with respect to Phon's position seeking the LWOP instruction, "[i]f [Phon] is incorrect, then he waived any possible *ex post facto* claim regarding the imposition of a penalty more onerous than life without parole for twenty-five years." *Phon I*, at 109 (Cooper concurring). Justice Cooper's words now ring prophetic, as Phon is procedurally barred from bringing the claim made herein.

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finding an aggravating circumstance does not increase the minimum sentence; as in some other states the finding an aggravating circumstance makes the minimum sentence LWOP.

II

THE SENTENCE OF IMPRISONMENT OF LIFE WITHOUT PAROLE FOR A JUVENILE OFFENDER DOES NOT VIOLATE THE EIGHTH AMENDMENT.

In his petition, Phon has argued that this Court should extend its holding in *Roper v. Simmons*[8] beyond juvenile offenders sentenced to death. Relying on this Court's rationale and reasoning from *Roper,* Phon has contended that juvenile offenders should be ineligible for the sentence of life without the possibility of parole (LWOP) based on the same Eighth Amendment considerations. See Petition, pgs. 22-28. Phon's argument is without merit.

Recently, in *Kennedy v. Louisiana*, — U.S. —, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), when discussing the distinction between intentional first-degree murder and non-homicide crimes against individual persons, this Court noted that "the latter crimes may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' they cannot compare to murder in their 'severity and irrevocability.'" 128 S.Ct. 2641, 2644. Indeed, there can be no crime more grave and final then murder. Preservation and protection of human life has always been of paramount importance in all civilized societies. It is for that reason, upon the finding of an aggravating

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[8]543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

circumstance beyond a reasonable doubt, guilty defendants in Kentucky may be sentenced to death. K.R.S. 507.020; 532.025.

The State's power to impose death on convicted capital murders is not unlimited. The Eighth Amendment of the United States Constitution, which is applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment has been interpreted to prohibit punishments that are disproportionate to the crime or are excessive. *Atkins v. Virginia,* 536 U.S. 304, 311, n. 7, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Proportionality determinations require an examination of "evolving standards of decency that mark the progress of a maturing society" in deciding a punishment's constitutionality. *Trop v. Dulles,* 356 U.S. 86, 99, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). Assessing evolving standards of decency under the proportionality review initially requires "objective evidence of the country's present judgment concerning the acceptability of [a given punishment] as a penalty for [the crime being tried]." *Coker v. Georgia,* 433 U.S. 584, 593, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). *See also Roper v. Simmons,* 543 U.S. at 563, 125 S.Ct. 1183 ("sufficient evidence at present of a national consensus."). Objective indicia of society's standards may be found in legislative enactments. *See Roper v. Simmons,* 543 U.S. at 564-68, 125 S.Ct. 1183; *Atkins v. Virginia,* 536 U.S. at 313-17, 122 S.Ct. 2242. The aforementioned considerations have caused this Court to exempt juveniles (*Roper*) and the mentally retarded (*Atkins*)

from eligibility for capital punishment.

Every state provides some mechanism for the imposition of adult sentences on a juvenile offender for certain types of crimes. In those jurisdictions, there is no evident trend away from imposing serious adult criminal liability upon juvenile offenders. According to a recent survey by the Delaware Supreme Court, forty-two (42) states permit juvenile murderers over 14 and less than 18 years old to be sentenced to life without parole (and forty-nine [49] provide for an adult disposition for intentional murder by this same juvenile group). *Wallace v. State,* 956 A.2d 630, 640 (Del. 2008); *also see*, *State v. Allen,* 958 A.2d 1214, 1233-1236 (Conn. 2008). In twenty-seven of those states, the LWOP sentence is mandatory for anyone, child or adult, found guilty of intentional murder. Id. In the past twenty (20) years courts have consistently rejected Eighth Amendment claims made by juvenile murderers attacking their life sentences. *State v. Allen,* 958 A.2d at 583. *See also Solem v. Helm,* 463 U.S. 277, 290 n. 15, 103 S.Ct. 3001, 3009 n. 15, 77 L.Ed.2d 637 (1983) ("no sentence of imprisonment would be disproportionate" to felony murder).

As noted in Argument I herein, in *Roper,* this Court limited its holding to juveniles sentenced to death. *Roper v. Simmons,* 543 U.S. at 566, 125 S.Ct. 1183. In that opinion, this Court noted that the punishment of life imprisonment without the possibility of parole as a constitutionally viable outcome. *Id.* at 572, 125 S.Ct. 1183. This Court would not have recognized a sentence of LWOP as an acceptable alternative to death in this context if such a sentence would violate the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to deny the petition for writ of *certiorari*.

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